No. 89-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DANIEL P. HULSEY,

Petitioner,

v.

USAIR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY BRIEF OF PETITIONER

ARGUMENT

Key inaccuracies, more than hollow arguments, necessitate reply to USAir's Brief in Opposition. For convenience, this reply is organized per roman numeraled headings utilized by USAir.

I. IMPROPER SUMMARY JUDGMENT ISSUE

The five points urged by USAir are either grossly inaccurate or of no value to USAir's assertion that the writ should be denied. First, the fact that discovery was stayed by agreement in no way mitigates the harm of the court's summary judgment in advance of discovery. Indeed, this fact exacerbates the harm of the approach outlawed by this Court in *Celotex Corporation v. Catrett*,

477 U.S. 317, 91 L.Ed.2d 165 (1986). Cooperation in discovery is to be encouraged. Where, as here, a question about the underlying validity of the statute was pending Supreme Court determination, an agreed stay of discovery was in order. Likewise, where, as here, defendant wished to submit an issue for summary judgment determination that might have obviated the need for discovery, an agreed stay of discovery is in order. On the other hand, where, as here, the Supreme Court upholds the underlying statute[1] and then the Fifth Circuit reverses the basis of the district court's summary judgment (a summary judgment based on the premise that no discovery would be necessary since the employer was free to fire a "protected employee" for any reason, including an improper reason), the employer should, in good faith, *join* in the motion for rehearing filed by Hulsey so that remand rather than affirmance is the judgment of the Fifth Circuit.

Secondly, the fact that petitioner did not move to compel, nor initiate new discovery is unremarkable and irrelevant to USAir's opposition to the writ. Again, the parties were cooperating as to discovery so that the issue USAir felt would be dispositive could be placed before the district court without conducting potentially unnecessary and substantial discovery that was then pending. There was no need of new discovery; instead, there was a need for a ruling on a potentially dispositive issue. Not until the Fifth Circuit reversed the rationale of the district court was there any need for a continuation of the lawsuit, restarting at the discovery point; unfortunately, the Fifth Circuit abbreviated the process by reversing the rationale of the district court yet, in violation of *Celotex*, *supra*, granting summary judgment against plaintiff for lack of evidence.

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[1] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 94 L.Ed.2d 661 (1987).

Thirdly, USAir inaccurately advises this Court that Hulsey did not urge that the stay of discovery rendered the motion for summary judgment premature. On the contrary, Hulsey's opposition stressed that there would be no basis for granting summary judgment, given the outstanding discovery as to the cause of plaintiff's termination, unless the court ruled that a carrier fully and completely satisfies all obligations under the Act by simply hiring a "protected" employee (TR 190-192). Thus, the motion granted on the district's rationale *required* no discovery. But the Fifth Circuit rejected that rationale and thus, as Hulsey had advised the district court, discovery of disputed facts was essential.

Finally, it is absurd for USAir to suggest that "the interrogatories and requests for production served by Petitioner before the agreed stay of proceedings are not material to the specific, undisputed facts upon which summary judgment was granted" (Brief in Opposition, p. 2). While the district court viewed such interrogatories and requests for production irrelevant, since it ruled, as a matter of law, that a carrier fully and completely satisfies all obligations under the Act by simply hiring a "protected" employee, and then can immediately fire such an employee for any reason whatever, the issue before the Supreme Court is whether the Fifth Circuit, after reversing such a summary judgment holding, can then, nonetheless, grant summary judgment in absence of discovery that had been held in abeyance pending the resolution of the legal point the district court incorrectly resolved.

II. PROOF SCHEME ISSUE

As to whether the *McDonald Douglas*[2] order of proof in employment discrimination cases is applicable to discharge claims under Section 43(d)(1) of the Airline Deregulation Act of 1978 ("the Act"), USAir (1) misstates

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[2] *McDonald Douglas v. Green*, 411 U.S. 792 (1973).

the holding of the Fifth Circuit and (2) misstates plaintiff's allegations in the district court.

Specifically, USAir is badly inaccurate in suggesting that the district court and the Fifth Circuit had the same holding. While the district court held that Section 43(d)(1) extends only to a preference in hiring and not post-hire rights superior to other employees (Tr. 268, 270-71), the Fifth Circuit held that analysis of a claim by a protected employee under the Act *cannot* stop at simple proof that the carrier hired the protected employee. The entire *Celotex*, *supra*, problem stems from the next step taken by the Fifth Circuit: The Fifth Circuit *itself resolved* the material disputed facts (the ones the district court expressly refused to resolve and USAir had labeled immaterial) adversely to Hulsey. (Slip Opinion, 2690, fn. 3). The Fifth Circuit labeled crucial disputed facts as undisputed—whether USAir would continue to employ pilots who were convicted for off-duty misconduct under some circumstances and whether USAir treated Hulsey as it would other pilots under similar circumstances (Slip Opinion, 2690)—when, in fact, Hulsey alleged to the contrary, submitted an affidavit to the contrary, and had extensive discovery pending on these matters.

USAir again misstates the record badly to suggest Hulsey did not allege he was hired with the intent of terminating his employment just to get around Section 43(d)(1). In fact, Hulsey alleged USAir had circumvented the Right of First Hire provisions of the Employee Protection Program of the Act "by terminating plaintiff's employment without justification and under the guise of [his] so-called 'probationary period'" (Tr. 6, ¶ 6.1). Hulsey alleged that USAir's stated reasons for termination were pretextual, and that the termination was a bad faith circumvention of his right of first hire under the Act (Tr. 3-7, see especially ¶¶ 5.8-5.18, 5.20, 5.22, 6.1-6.3, 8.2).

III. SYSTEM BOARD OF ADJUSTMENT ISSUE

Again, USAir inaccurately suggests that there are "procedural deficiencies (Brief in Opposition, pp. 3-4) in connection with Hulsey's contention that his termination should have been referred to a System Board of Adjustment. In fact, Hulsey alleged that following his discharge, he requested a hearing without success and that he has exhausted his administrative remedies (Tr. 5, ¶ 5.17; 6, ¶ 5.24). The Hulsey affidavit, submitted in advance of summary judgment, stated, inter alia:

> 14. After my conviction, USAir gave me no opportunity to explain my situation, nor, despite my efforts, would USAir provide me any hearing or access to any grievance procedure. USAir did have a collective bargaining agreement with the Airline Pilots Association providing for a grievance procedure and a neutral determination of whether just cause existed for termination, but that procedure was denied to me entirely on grounds that I was a probationary employee.

(Tr. 143-44). In his Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment, Hulsey stated:

> [USAir] has devoted a major portion of its brief to an assertion that [Hulsey] was discharged for legitimate reasons . . . . That discussion, however, has no place at this point in the proceedings. Specifically, this discussion only has relevancy if the court determines that an employee hired under the right of first hire has protection against illegitimate (lack of cause) termination. In this event, the issue of just cause awaits determination on patently disputed facts (*with outstanding discovery*), either before the court, if the court concludes that wrongful termination matters should be submitted to the courthouse, even where a grievance procedure providing for labor arbitration is in place with the carrier, *or as we suggest, to a labor arbitrator.*

(Tr. 190) (emphasis added).

USAir's suggestion that Hulsey is somehow asking an arbitrator to interpret the Airline Deregulation Act of 1978 entirely misses the point. Certainly the court is the place for the necessary interpretation of the Airline Deregulation Act of 1978. Thus, Hulsey sought court interpretation by filing his federal court suit. The district court applied the improper interpretation; the Fifth Circuit in effect reversed the district court, but sidestepped the next question—whether Hulsey's termination was a violation of the Act—by granting summary judgment regardless of the facts (and pending discovery). Once the Fifth Circuit determined that a carrier may not immediately fire, for any reason including a purpose of circumventing the Act, a "protected" employee, someone, either a court or the grievance procedure of the carrier, must determine the merits—whether there was cause for termination or whether termination was for the purpose of circumventing the Act. Strong legal and policy arguments favor resolution of these issues before a System Board of Adjustment (the equivalent of a labor arbitrator) rather than in the courts.

IV. SUBSTANTIAL PUBLIC IMPORTANCE

It cannot be objectively argued that the key employee protection provision of a major federal commerce statute lacks importance to society-at-large. Whether in this, or in other congressional acts to protect employees, it is essential that the federal courts enforcing those acts apply proof schemes of the *McDonald-Douglas*, *supra*, pattern to avoid meaningless statutory "protections." Moreover, society-at-large, all potential litigants, has an interest in preventing the issuance of summary judgments despite outstanding, pertinent discovery.

Respectfully submitted,

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